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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,

Petitioners,

vs.

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by the original defendants; UNITED STATES OF AMERICA; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WARREN TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA; THE SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA; THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE SENDAK, as Attorney General of the State of Indiana; HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; THE INDIANA STATE BOARD OF EDUCATION, a public corporate body; INDIANA STATE TEACHERS ASSOCIATION; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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vs.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners[1] hereby pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for

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1. Petitioners are the original defendants in this action, the Board of School Commissioners of the City of Indianapolis, together

(Continued on next page)

the Seventh Circuit entered on July 16, 1976 in the consolidated causes captioned "United States of America, Plaintiff-Appellee, Donny Brurell Buckley, *et al.*, etc., Intervening Plaintiffs-Appellees, vs. Board of School Commissioners of City of Indianapolis, Indiana, *et al.*, Defendants-Appellants", Cause Nos. 75-1730 through 75-1737, 75-1765, 75-1936, 75-1964, 75-1965 and 75-2007.

OPINIONS BELOW.

The opinion of the Court of Appeals filed July 16, 1976, and the opinion and judgment of the United States District Court for the Southern District of Indiana filed August 1, 1975, are not yet reported. Copies of such opinions and judgment are set forth in Appendix A.

Prior opinion, order and supplemental opinion of the District Court, reported at 368 F. Supp. 1191 (S. D. Ind. 1973), are reprinted in Appendix A beginning at Page A52 for the reason that such opinions discussed matters relevant to the questions presented by the present petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 16, 1976. None of the parties filed a petition for rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Did the District Court, upon determining that a sufficient legal basis existed for interdistrict relief in a school desegregation case, exceed its statutory jurisdiction or improperly exercise its equitable powers by ordering implementation of a specific remedy

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(Continued from preceding page)

with its elected members and appointed superintendent of schools, in their official capacities ("IPS"). Respondents named in the caption include all other parties in the Court of Appeals.

consisting of transfer of specified numbers of black students from their resident city school district to suburban schools, without giving the school districts and other parties affected thereby an opportunity to present alternative plans, without hearing and determining the feasibility and propriety thereof, without making the findings required by 20 U. S. C. § 1713 and 20 U. S. C. § 1755, and without providing an opportunity for community participation in the development of a voluntary remedial plan as required by 20 U. S. C. § 1758?

2. Is the interdistrict desegregation remedy ordered by the District Court, consisting solely of involuntary transfers of black students from their resident city school district to designated suburban school districts, commensurate with the scope of the interdistrict violation found?

3. Did the District Court improperly exercise its equitable powers, or abuse its discretion, by ordering an interdistrict remedy which (a) requires solely the involuntary transfer of black students to school systems of which their parents are not voting constituents, without any corresponding requirement for transfer of white students and without any conditions to assure that the educational opportunities offered the transferred black students will be thereby improved; (b) financially burdens and discriminates against the city school system by requiring payments under state law to suburban school systems in excess of their increased costs attributable to the transferee students; and (c) necessarily will require closing of a substantial number of city school facilities without proof of their inferiority and dismissal of a substantial number of teachers and staff without requiring employment of any additional staff by the receiving suburban schools?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and certain provisions of the Equal Educational Opportunities Act of 1974, Title II of Public Law 93-380, 20 U. S. C. § 1701, *et seq.*, which provisions are set forth in Appendix D beginning at page A122.

Also significant is Indiana Acts 1974, P. L. 94, codified as Indiana Code 20-8.1-6.5, relating to the transfer of students from one school corporation to another in compliance with a court order to effect a plan of desegregation, which statute is reprinted in Appendix D beginning at page A126.

STATEMENT OF THE CASE.

A. Proceedings Prior to 1975.

The United States commenced this action in 1968 by complaint against petitioners pursuant to Section 407 of the Civil Rights Act of 1964, 42 U. S. C. § 2000c-6. Jurisdiction of the District Court was invoked under that Section and 28 U. S. C. § 1345.

The District Court on August 18, 1971 rendered its decision that IPS was an unconstitutionally segregated school system, 332 F. Supp. 655 (S. D. Ind. 1971), affirmed, 474 F. 2d 81 (7 Cir. 1973), *cert. denied*, 413 U. S. 920 (1973). Upon the direction of the District Court the United States added respondent school corporations as parties defendant but sought no affirmative relief against the added defendants. On September 14, 1971 the District Court granted the petition of respondents Buckley to intervene as plaintiffs on behalf of the class which they sought to represent. In an amended complaint filed October 21, 1971, such intervening plaintiffs named respondents state officials and school corporations, plus other school corporations

no longer parties, as defendants. Such amended complaint asserted jurisdiction under 42 U. S. C. §§ 1983 and 1988, 28 U. S. C. §§ 1343(3), 2201 and 2202, and under the Fourteenth Amendment to the United States Constitution.

In their amended complaint (Appendix C, A115), intervening plaintiffs alleged that defendants by their method of maintaining and operating separate school corporations effected racial segregation and discrimination in the public school systems of Marion County and the Indianapolis metropolitan area, in violation of the Fourteenth Amendment rights of such plaintiffs. They asked the Court to declare unconstitutional certain Indiana statutes relating to the organization and boundaries of separate school districts in Marion County and the organization of local government therein "insofar as they effect racially separate public schools and school systems in Marion County and the Indianapolis metropolitan area", and further prayed for injunctive relief "including if necessary" either consolidation or merger of the defendant school systems, or adoption by such defendants of agreements and arrangements for operation of the schools in the metropolitan area as would "secure to plaintiff-intervenors equal educational opportunities in desegregated and nondiscriminatory schools and school systems." They further requested the Court to order defendants to prepare a plan for the operation of all public schools within the school systems joined as defendants "in conformity with the requirements of the Fourteenth Amendment." (A120.)

Following a trial on such issues, the District Court filed an opinion and judgment on July 20, 1973. 368 F. Supp. 1191 (S. D. Ind. 1973). The Court found (1) a desegregation plan confined to IPS only would not be viable, 368 F. Supp. at 1197-1199 (A57-60); (2) the State of Indiana is legally responsible for the operation of all public schools and consequently for discriminatory actions of local school corporations, and had an affirmative duty to end the conditions so created, 368 F. Supp. at 1199-1203 (A60-68); (3) no evidence was presented

of overt acts of de jure segregation committed by any of the added defendant school corporations within their respective borders, but the Marion County school defendants unanimously opposed the proposed consolidation recommended by a county school reorganization committee, 368 F. Supp. at 1203 (A68-69); and (4) racial discrimination in housing, tolerated or encouraged by the State, in the Indianapolis metropolitan area resulted in segregation in schools as between IPS and surrounding suburban school districts, 368 F. Supp. at 1204-1205 (A70-71). The Court concluded that the Indiana General Assembly had the power and duty to provide a metropolitan school desegregation remedy, in default of which the Court would be required to devise its own plan, 368 F. Supp. at 1205 (A72), and the Court recommended that the area to be included in such a metropolitan plan consist of all Marion County plus a tier of townships continguous to the county, 368 F. Supp. at 1207 (A77). The constitutionality of the Indiana statutes challenged in the amended complaint was expressly not decided, 368 F. Supp. at 1208 (A78).

As "interim relief" the District Court ordered the suburban school corporations in the defined area, with two exceptions, to enroll a number of Negro children from IPS equal to 5% of their total enrollment, effective with the 1973-74 school year. 368 F. Supp. at 1209 (A80). On August 8, 1973 the Court stayed that order for one year. The Court further ordered IPS to institute a plan effective with the 1973-74 school year which would provide for a minimum Negro enrollment of approximately 15% in each IPS elementary school, and to rearrange high school feeder patterns, 368 F. Supp. at 1209 (A80-81). Such a plan for IPS elementary schools was devised with the assistance of court-appointed commissioners and implemented in the 1973-74 school year, and continues in effect today. That portion of the Court's order relating to high schools was deleted to await a final desegregation plan.

In a supplemental opinion filed December 6, 1973, 368 F. Supp. at 1223 (A96) the Court established February 15, 1974 as a "reasonable time" within which the General Assembly could perform its asserted duty to make provision for a metropolitan desegregation plan, 368 F. Supp. at 1224 (A99). The Court suggested and discussed different methods by which the General Assembly could "approach the problem of effectively desegregating IPS", 368 F. Supp at 1227-1228, 1230 (A104-106, 108). In discussing these options the Court strongly suggested that the General Assembly could "discharge its duty in this matter" and thereby satisfy the Court by simply amending the existing state law relating to student transfers to provide for the method of payment and responsibility for transportation and tuition for students transferred from a de jure segregated district to other districts, 368 F. Supp. at 1230-1231 (A110-111). The Court made clear its preference for a "one-way transfer plan," whereby a percentage of IPS black students would be enrolled in suburban school corporations, over the other alternatives discussed. Not surprisingly, the General Assembly responded by enacting in its 1974 session just such a limited transfer statute as the Court suggested. Acts 1974, P. L. 94, I. C. 20-8.1-6.5 (Appendix D, A126-133).

The District Court in its supplemental decision also vacated the interim interdistrict transfer orders previously stayed, suggesting the percentage there provided would no longer be sufficient after the then current school year. The Court concluded that "if the solution is handed back to the Court by default, additional scrutiny will necessarily be given to complete consolidation along metropolitan lines." 368 F. Supp. at 1231 (A111-112). In a separate unpublished order on December 6, 1973, the District Court directed petitioners to "proceed forthwith to prepare a contingent plan or plans for the final desegregation of IPS, one of which shall be prepared on the assumption that certain IPS pupils will be transferred to suburban schools in accordance with the observations set out in Part V of

Indianapolis III. [368 F. Supp. at 1228-1230, A105-109]." IPS did prepare and file with the Court such a plan, as well as alternative plans for desegregation within IPS only. No action was taken by the Court or other parties concerning those plans.

B. The Present Judgment.

Following the decision of this Court in *Milliken* v. *Bradley*, 418 U. S. 717 (1974), the Court of Appeals reversed "the District Court's findings, conclusions, orders and rulings insofar as they pertain to a metropolitan remedy beyond the Uni-Gov boundaries [*i.e.* the boundaries of Marion County]," 503 F. 2d 68, 86 (7 Cir. 1974). The Court remanded the case to the District Court with directions to "determine whether the establishment of the Uni-Gov boundaries without like reestablishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken*" (503 F. 2d at 86). This Court denied certiorari. 421 U. S. 929 (1975).

After a further trial on remand, the District Court on August 1, 1975 filed an opinion and entered the judgment which is the subject of the present petition (A114). The Court found that the establishment of Uni-Gov without a like reestablishment of IPS boundaries, together with other legislation affecting school district boundaries in Marion County, "warrants a limited interdistrict remedy within all of Marion County, Indiana as hereafter described." (A41.) The Court also found that actions of the respondent Housing Authority of the City of Indianapolis in locating and constructing public housing projects solely within IPS boundaries had contributed to interdistrict school segregation (A39). Consistent with his previously expressed preference for a "one-way" transfer of IPS black students to suburban schools, the district judge then entered a series of specific judgments directing IPS to transfer to each of the Marion County school corporations outside IPS, with the exception of Washington and Pike Townships which already were approaching a black student enrollment of 15% within

their own boundaries, specified numbers of IPS black students in grades 1 through 9 for the 1975-76 school year, with corresponding numbers of transfers of first grade students in subsequent years until all 12 grades were included, and directing the respondent districts to accept and enroll such students in their schools (A47-50). The number of students ordered transferred was computed on the basis of enrollment statistics for the 1974-75 school year "in such number as to cause the total enrollment of pupils in such [transferee] school corporation, after the transfers have been accomplished, to be approximately 15% black" (A44). These judgments were stayed pending appeal.

In a separate judgment the District Court "ordered and adjudged that IPS prepare and file with the Court, on or before October 15, 1975, a plan, or alternative plans, for the final desegregation of its schools, taking into account the transfer of pupils ordered herein" (A50). That judgment was not appealed, but on October 2, 1975, the District Judge entered a stay thereof until further notice, which stay remains in effect.

The District Court's judgment was entered simultaneously with his ruling that the facts warranted an interdistrict remedy within Marion County under the legal standards of *Milliken* v. *Bradley, supra.* The Court did not give IPS, any other affected school corporation, or plaintiffs an opportunity to prepare and submit to the Court for consideration any alternative interdistrict desegregation plans which might satisfy the requirements of the Fourteenth Amendment to desegregate IPS schools, including but not limited to methods suggested in the Court's previous opinions. Moreover, the Court did not attempt to make any findings concerning the feasibility of alternative methods of desegregation as required by 20 U. S. C. § 1713, or to provide a reasonable opportunity for development of a voluntary remedial plan, after notice of the violation, as required by 20 U. S. C. § 1758.

On July 16, 1976, the Court of Appeals affirmed in all respects the judgments of the District Court. With respect to the propriety of the specific remedy ordered by the District Court, the Court of Appeals said only:

> "The limited interdistrict remedy ordered by the District Court is supported by the record and in accord with legal principles enunciated in *Milliken*" (A26).

REASONS FOR GRANTING THE WRIT.

I. The Court of Appeals by approving the remedy decreed by District Court without giving the parties an opportunity to develop and propose alternative plans, as required by the Equal Educational Opportunities Act of 1974, has decided an important question of federal law not settled by this Court and has sanctioned a substantial departure from the usual course of judicial proceedings in school desegregation cases.

A. The Equal Educational Opportunities Act.

The Equal Educational Opportunities Act of 1974, Title II of P. L. 93-380, codified as 20 U. S. C. §§ 1701-1758, became effective October 20, 1974, P. L. 93-380, § 2(c), and presumptively applies at least to all federal court desegregation orders entered after that date.[2] The statute provides that in formulating a remedy for denial of equal protection of the laws which may involve transportation of students, a federal court shall consider and make specific findings on the efficacy of certain specified kinds of remedies set forth in an order of priority, require implementation of the first of the remedies which would meet constitutional requirements, 20 U. S. C. § 1713, and impose only such remedies as are essential to

2. The validity of the retroactivity of the application of § 256, 20 U. S. C. § 1755, to orders entered after June 30, 1974, need not be considered here since the District Court's order was entered August 1, 1975.

correct particular denials of equal protection, 20 U. S. C. § 1712. The statute further permits approval of a plan voluntarily proposed which varies from the standards set forth in the statute, 20 U. S. C. § 1716. Part B further provides that a federal court shall not order as a remedy for de jure segregation the implementation of any plan involving transportation of students unless all alternative remedies are first found to be inadequate, 20 U. S. C. § 1755. The act states that no such order shall be entered until the local school district affected thereby has been given notice of the details of the violation and a reasonable opportunity to develop a voluntary remedial plan with sufficient time for community participation therein. 20 U. S. C. § 1758.

The interpretation and application of this statute to court-ordered plans for desegregation of school systems where constitutional rights have been found violated, and the application to the statutory limitations of 20 U. S. C. § 1702(b) which states that "the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the Fifth and Fourteenth Amendments to the Constitution of the United States," have never been considered or decided by this Court. The statute deals with important questions of public policy having major national significance and affecting large numbers of students and parents across the country, as federal courts increasingly are finding the existence of unconstitutional segregation in the schools of many large urban areas and school systems. Only a few lower federal courts have had occasion to consider any provision of the statute. While certain provisions thereof, particularly § 214, 20 U. S. C. § 1714(a), which purports to prohibit requiring transportation of a student to a school other than the school closest or next closest to place of residence, may well be subject to overriding constitutional requirements, as the Sixth Circuit held in *Brinkman* v. *Gilligan*, 518 F. 2d 853, 856 (6 Cir. 1975), it does not necessarily follow that all other proce-

dural requirements are likewise inapplicable, particularly in view of the broad separability clause, 20 U. S. C. § 1721. Those few courts which have considered the statute have assumed that the findings required by 20 U. S. C. § 1713 should be made in the case of any order entered after the effective date of the act, *Keyes* v. *School District No. 1, Denver, Colorado,* 521 F. 2d 465, 477 n. 9 (10 Cir. 1975), or have specifically considered the alternative possible remedies and made the findings contemplated by that section and by § 1755, *Morgan* v. *Kerrigan,* 401 F. Supp. 216, 263-264 (D. Mass. 1975), *affirmed,* 530 F. 2d 401, 412-413 (1 Cir. 1976).

It does not appear that the requirement of 20 U. S. C. § 1758 that a local school board be given the opportunity to develop voluntary plans prior to any Court remedial order, has been considered in any reported decision. In the present case, while it is true that IPS had notice of the nature of the violations within its own district by the District Court's decision of August 18, 1971, the parties were not notified of the details of the interdistrict violation which the Court determined warranted an interdistrict desegregation remedy until the District Court issued its order on August 1, 1975. Yet the Court, in proceeding to order its specific interdistrict remedy, not only ignored the possible application of this statutory requirement but failed to give any consideration to the possible use of alternative remedies which Congress directed should be considered.

B. The Procedure Followed by the District Court in Ordering the Interdistrict Remedy.

Immediately upon finding the existence of an interdistrict violation within the standards of *Milliken* v. *Bradley,* 418 U. S. 717 (1974), the Court entered judgment ordering implementation of a specific interdistrict plan formulated solely by the Court and not suggested by any party. The District Court thus "departed from the accepted and usual course of judicial proceedings", Rule 19(1)(b), universally followed

by other courts which have had occasion to consider the question of interdistrict desegregation remedies, as well as the procedure followed by courts faced with the necessity to order a remedy for de jure segregation within large urban school systems. Since the Court of Appeals in approving the remedy sanctioned such a departure by the District Court, this Court should exercise its supervisory power to determine the propriety of the procedure followed in this case, and the procedure which should be followed by other courts dealing with similar problems, regardless of the applicability of the statutory requirements referred to above. Moreover, the District Court ordered a remedy which finds no precedent in any other reported decision in which an interdistrict desegregation remedy was ordered or considered.

Other courts have ordered implementation of an interdistrict remedy only after receiving plans from all affected parties and interested community groups, holding hearings on such proposals, obtaining the views of experts and weighing the advantages and disadvantages of the various alternatives.[3] Before ordering implementation of desegregation plans within a single large urban school district the federal courts have likewise uni-

3. See, *e.g. Evans* v. *Buchanan*, 393 F. Supp. 428, 446-447 (D. Del. 1975), affirmed, ... U. S. ....., 96 S. Ct. 381, 46 L. Ed. 2d 293 (1975), opinion on remedy, 416 F. Supp. 328, 334-335 (D. Del. 1976) (ordering consolidation and reorganization of districts); *Bradley* v. *Milliken*, 345 F. Supp. 914, 916-917, 920-922, 938 (E. D. Mich. 1972), affirmed and vacated in part, 484 F. 2d 215 (6 Cir. 1973), reversed, *Milliken* v. *Bradley*, 418 U. S. 717 (1974) (afer hearing on interdistrict plans submitted the Court appointed a panel to develop further plans, with subsequent opportunity for presentation of objections and hearings thereon); *Bradley* v. School *Board of City of Richmond, Virginia*, 338 F. Supp. 67, 78, 246 (E. D. Va. 1972), reversed, 462 F. 2d 1058 (4 Cir. 1972), affirmed by equally divided Court, 412 U. S. 92 (1973) (school board interdistrict plans considered and approved; additional planning ordered). See also *Newburg Area Council, Inc.* v. *Board of Education, Jefferson County, Kentucky*, 489 F. 2d 925, 932 (6 Cir. 1973), vacated, 418 U. S. 918 (1974), reaffirmed, 510 F. 2d 1358 (6 Cir. 1974); *Hoots* v. *Commonwealth of Pennslvania*, 359 F. Supp. 807, 824-825 (W. D. Pa. 1973), appeal dismissed, 495 F. 2d 1095 (3 Cir. 1974).

formly followed a similar procedure.[4] Even in cases where extensive litigation and numerous appeals concerning the appropriate remedy to be adopted had occurred extending over a period of several years, the courts have required full consideration of alternative plans and objections thereto before entering a final decree.[5]

In the present case neither IPS, any of the added defendant school corporations, state officials, the plaintiffs, nor any interested group or organization has ever had an opportunity to propose remedial plans for desegregation of IPS schools within Marion County, present to the Court pertinent facts relating to possible alternatives, or have the Court determine the best alternative after weighing the evidence and the advantages and disadvantages of each. When the Court issued its decision finding a legal basis for an interdistrict remedy, it simultaneously fashioned and decreed the specific remedial plan. The Court never requested or considered plans or proposals from any of the parties to the case, including the affected school districts,

4. See, *e.g.*, *Morgan* v. *Kerrigan*, 401 F. Supp. 216, 224-227 (D. Mass. 1975), affirmed, 530 F. 2d 401 (1 Cir. 1976) (Boston); *Keyes* v. *School District No. 1, Denver Colorado*, 380 F. Supp. 673, 675 (D. Colo. 1974), affirmed in part and reversed in part, 521 F. 2d 465 (10 Cir. 1975); *Dowell* v. *Board of Education of Oklahoma City Public Schools*, 338 F. Supp. 1256, 1259 (W. D. Okla. 1972), affirmed, 465 F. 2d 1012 (10 Cir. 1972); *Booker* v. *Special School District No. 1, Minneapolis, Minn.*, 351 F. Supp. 799, 810 (D. Minn. 1972) (school board plan approved with modifications); *United States* v. *School District of Omaha*, 521 F. 2d 530, 546-548 (8 Cir. 1975) (board directed to submit plan under court guidelines); *Amos* v. *Board of Directors of City of Milwaukee*, 408 F. Supp. 765, 823 (E. D. Wis. 1976) (special master appointed to conduct hearings and recommend plan); *Arthur* v. *Nyquist*, 415 F. Supp. 904, 970 (W. D. N. Y. 1976) (Buffalo).

5. *Bradley* v. *Milliken*, 402 F. Supp. 1096, 1103-1104 (E. D. Mich. 1975) (Detroit) (experts appointed to assist Court); *Calhoun* v. *Cook*, 487 F. 2d 680, 684 (5 Cir. 1973), remanding for further hearings plan adopted by District Court at 362 F. Supp. 1249 (N. D. Ga. 1973) (Atlanta); *Tasby* v. *Estes*, 412 F. Supp. 1192, 1194 (N. D. Tex. 1976), after remand per 517 F. 2d 92 (5 Cir. 1975) (Dallas); *Northcross* v. *Board of Education of Memphis City Schools*, 489 F. 2d 15, 16 (6 Cir. 1973).

never received or considered an amicus plan tendered in 1973, which the Court then had found "premature," 368 F. Supp. at 1197 (A56), and never heard the concerns or proposals of interested community organizations and parents who sought but were denied leave to intervene. It is apparent that the Court formulated its own plan at an early stage of the case, ordered the parties to implement that plan when the General Assembly had taken no contrary affirmative action, and was not receptive to any suggestions of alternative approaches to the problem of formulating an interdistrict remedy. 368 F. Supp. 1191, 1228-1231 (S. D. Ind. 1973) (A105-111). Compare the Court's prior order for interim interdistrict transfers, 368 F. Supp. at 1209 (A80).

The summary procedure adopted by the Court with respect to the remedy wholly precluded consideration of the viability or adaptability to the Indianapolis situation of desegregation techniques which have been proposed and reviewed by courts in other school systems, both in interdistrict and single-district contexts, including techniques which Congress in 20 U. S. C. § 1713 mandated district courts to consider. In addition to the possibilities alluded to by the Court in his December, 1973 opinion, 368 F. Supp. at 1227-1228 (A104-105), and solely by way of illustration, remedial techniques which could have been considered as part of an interdistrict remedy include reorganization or revision of school district boundaries in a manner which would change the existing racial composition of the school populations within IPS and the separate suburban districts, establishment of "magnet schools" or "optional schools" having specialized or alternative educational programs which could attract on a voluntary basis both black and white students from IPS and other school districts,[6] pairing or clustering of selected

6. Decisions holding some form of the "magnet schools" concept acceptable as a major component of a desegregation plan in an urban area include *Hart* v. *Community School Board of Education, New York School District No. 21*, 512 F. 2d 37, 52-53 (2 Cir. 1975) and *Tasby* v. *Estes*, 412 F. Supp. 1192, 1205 (N. D. Tex. 1976).

schools on an interdistrict basis with possible revision of grade structures and utilizing contiguous areas, establishment of "desegregation centers" where certain portions of the educational program could be operated jointly by more than one school district, or an interdistrict majority to minority transfer plan which could be elected on a voluntary basis by parents and students.[7]

Petitioners desire to minimize the necessity for involuntary reassignments of students for desegregation purposes, with the financial and other burdens inherent in plans focusing primarily on extensive transportation in a large urban area. See *Keyes* v. *School District No. 1*, 413 U. S. 189, 241-242, 248-251 (1973) (Powell, J., concurring in part). Of course, the enforcement of constitutional rights cannot be suspended or diluted because of popular disagreement with the methods necessary to effectuate such rights. *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955) (*Brown II*); *Monroe* v. *Board of Commissioners*, 391 U. S. 450, 459 (1968). But the procedure followed here by the District Court, and approved

7. The Court of Appeals, in rejecting the "voluntary transfer" proposal of the United States as a limited interdistrict remedy, focused solely on the procedures of the Indiana transfer statute giving discretion to the school corporations. I. C. 20-8.1-6.1 (A25). But it is well established that a federal court in ordering affirmative action to eliminate de jure segregation is not limited to or bound by the procedures specified by state law, even though facially neutral. *United States* v. *Scotland Neck City Board of Education*, 407 U. S. 484, 487-489 (1972); *Milliken* v. *Bradley*, *supra*, 418 U. S. at 744; Cf. *North Carolina Board of Education* v. *Swann*, 402 U. S. 43, 45 (1971). As this Court stated in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 26-27, a majority to minority optional transfer plan, at the election of the student and with transportation and space provided, certainly should be considered as a plan component, even if insufficient to fully accomplish the degree of desegregation required. See also the suggestion of a limited form of interdistrict remedy in Strickman, *School Desegregation at the Crossroads*, 70 Nw. U. L. Rev. 725, 760-767 (Nov.-Dec. 1975).

While "freedom of choice" which does not desegregate may be unacceptable, it is not *per se* impermissible as a desegregation tool in an appropriate case. *Green* v. *County School Board of New Kent County*, 391 U. S. 430, 440-441 (1968).

by the Court of Appeals, bypassed consideration of "the use of all available techniques" which could "achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *Board of School Commissioners of Mobile County*, 402 U. S. 33, 37 (1971). The procedure also bypassed the primary responsibility of the school authorities to devise and implement an affirmative plan to eliminate unlawful segregation in their schools, with judicial authority entering only when local authority defaults. *Brown II*, 349 U. S. at 299; *Swann*, 402 U. S. at 15-16; *McDaniel* v. *Barresi*, 402 U. S. 39, 41 (1971).

II. The interdistrict remedy ordered does not conform to the scope of the violation found.

The principal legal basis upon which the District Court relied in entering its interdistrict decree was stated as follows (A41):

> "The Court finds that the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries, given all of the other facts and circumstances set out in this and former opinions of this Court, warrants a limited interdistrict remedy within all of Marion County, Indiana, as hereafter described."

In affirming the judgment the Court of Appeals concluded (A19):

> "It is clear to us that Uni-Gov and its companion 1969 legislation were '[A] substantial cause of interdistrict segregation,' *Milliken* v. *Bradley*, 418 U.S. 717, 745 (1974), and '[C]ontributed to the separation of the races by . . . redrawing school district lines . . .' *Id.* at 755 (Stewart, J., concurring)."

The Court of Appeals further elaborated on this point by stating (A20):

> "In this case we are dealing with a situation in which but for certain events chargeable to the state, Marion

> County would be either a consolidated school district under the 1959 School Reorganization Act or IPS would have been expanded with the civil city of Indianapolis under Uni-Gov."

In *Milliken* v. *Bradley, supra,* this Court expressed the controlling remedial standards:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann,* 402 U.S., at 16." 418 U. S. at 744.
>
> ". . . The remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." 418 U. S. at 746.

If the lower courts correctly determined the nature of the interdistrict violation in this case, it would seem to follow that the remedy most nearly corresponding to the scope of the violation would be a remedy under which students could attend schools across district lines in either direction, without regard to the existing school district boundary lines in Marion County effectively frozen by Uni-Gov and its companion legislation described by the Court, and which would not be limited to transfers of IPS black students into surrounding districts.

In its 1975 decision the District Court gave no rationale for its determination that the limited one-way transfers ordered constituted the only appropriate remedy for the violation found, thus precluding consideration of other possible remedies such as voluntary or involuntary transfers of white suburban students to IPS, pairing and clustering of schools, or reorganization of district boundaries. The Court merely stated its conclusion (A44):

> "The Court finds that the Fourteenth Amendment compels it to order IPS to transfer, and for the added defendant school corporations, other than Pike and Washington, to receive approximately [9,525] black students, over a period of time, in order to effect a plan of desegregation

> within IPS which is acceptable within the meaning of such amendment."

In his prior July, 1973 opinion, under the heading "Interim Relief", the District Judge said, 368 F. Supp. at 1208 (A78):

> "The Court is of the opinion that it would be without jurisdiction to order the exchange of pupils between IPS and added defendants at this time. It is Negro children of IPS and not suburban children who are being deprived of a constitutional right, and so long as the various school corporations remain separate the Court believes that it would have no basis to direct that a suburban child be transported out of its own school corporation."

No authority was cited for the stated proposition. Nor is it apparent, in the absence of a finding of segregative actions by a school district in the operation of its own system, why such a school district could be compelled to accept and accommodate students transferred to it from another system but could not be required to exchange students or operate a combined educational program with such other system.

Other district courts have not felt constrained by such a limitation, assuming that a sufficient legal basis existed for ordering an interdistrict remedy.[8] The failure of the lower courts in the present case to analyze and apply a remedy for the interdistrict violation corresponding to the scope of the violation found has resulted in a decision in conflict with the applicable decision

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8. *Bradley* v. *Milliken*, 345 F. Supp. 914, 919 (E. D. Mich. 1972), affirmed in part, 484 F. 2d 215 (6 Cir. 1973), reversed on other grounds, 418 U. S. 717 (1974) ("Transporation and pupil assignment shall, to the extent consistent with maximum feasible desegregation, be a two-way process with both black and white pupils sharing the responsibility for transportation requirements at all grade levels."); *Evans* v. *Buchanan*, 416 F. Supp. 328, 350 (D. Del. 1976) ("Where one of the violations was the isolation of Wilmington from the possibility of union with other districts, *prima facie* an appropriate remedy would be ordering of the union to take place. We have determined that the violations found in the instant case present a situation where some sort of consolidation or reorganization is required.")

of this Court defining the appropriate standard in such a case, *Milliken* v. *Bradley, supra,* as well as with the kinds of remedies considered by federal courts in other reported decisions dealing with a similar problem. The Court should grant certiorari to further clarify its *Milliken* guidelines in such a situation.

III. The interdistrict remedy devised by the District Court and approved by the Court of Appeals, placing the entire burden and cost of desegregation upon black students and their resident school district, has decided an important question of federal law relating to the limits of a court's discretion in fashioning and effectuating a decree in a school desegregation case, which has not been but should be decided by this Court.

The general duty of district courts, where school authorities fail to provide an adequate constitutional remedy, was outlined by this Court in *Brown* v. *Board of Education,* 349 U. S. 294, 299 (1955) (*Brown II*). More recently in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), this Court was called upon to specify in more detail guidelines for the assistance of school authorities and "for the exercise of the district judge's discretion and for the reviewing function of the court of appeals," stating that "the task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." 402 U. S. at 15-16. However, *Swann* and other cases in this Court concerning administration of the remedy, were "confined to violations and remedies within a single school district," *Milliken* v. *Bradley,* 418 U. S. at 744. Even in the context of the single district, this Court has not been called upon to establish guidelines for the exercise of a federal court's equity powers in relation to the proper allocation of the burdens and costs of desegregation as between black and white students, parents and taxpayers. In *Milliken* the Court established the standards and limitations under which any kind of interdistrict remedy could be required,

but did not reach any question relating to the appropriate nature, scope and characteristics of such a remedy. That question is presented here.

The remedy devised and ordered by the District Court, solely on its own initiative, has the following principal characteristics:

1. Approximately 9,500 black students residing in IPS would be assigned to attend school, for the entire period of their public education in grades one through twelve, among eight separate, independently governed school corporations, with transportation provided at the expense of IPS. No interdistrict transfers of white students would be made.

2. Under the provisions of the state statute enacted while this case was pending and incorporated into the judge's decree, I. C. 20-8.1-6.5 (Appendix D, A126), IPS is required to pay, in addition to the capital and operational costs of transportation, tuition to each receiving school corporation based on that corporation's current per capita operational and capital budgets multiplied by the number of students transferred. The State of Indiana currently pays approximately 38% of the IPS operational budget. While the costs of such transfers cannot be precisely calculated at this time, IPS estimates a net annual cost to it, after deduction of the state-funded portion of the cost, approximating 7.5 million dollars after the program is fully operational. This calculation assumes cost savings resulting from reduction in IPS teaching staff at the ratio of one teacher for each 30 students transferred and the closing of approximately 15 IPS school facilities.[9] Since the required tuition payments are

9. Under Indiana law local tax levies for the support of school corporations are frozen at the dollar amount levied in 1972 for taxes collectible in 1973, I. C. 6-1.1-19, and school corporations are wholly dependent on annual increases in direct state assistance and appropriations therefor, controlled by the legislature, to meet increased operational costs, unless the state board of tax commissioners approves an "excessive tax levy" resulting in the state taking control of the school corporation's financial operations, I. C.

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not based upon incremental costs of serving additional students, and if, as the District Judge assumed, the suburban districts presently have "ample space available in which to house the transferees" (A45), the transfer of funds from IPS and its taxpayers could well result in substantial cost savings to the other districts.

3. Since the decree makes no provision for the employment of additional teachers or staff by the receiving school districts, or the transfer of any surplus IPS teachers to those districts, and since most transferee districts have indicated that the students could be absorbed into existing classrooms, the inevitable consequence would be a reduction in the total number of teachers serving the present school populations of IPS and the other affected districts. Further, the decree makes no provision for enrichment or compensatory programs which could improve educational opportunities for the transferred black students.

4. The decree would necessitate closing a substantial number of IPS school facilities, presently attended by black students, without any proof of the physical or educational inferiority of such facilities.

The federal courts in a number of cases have had occasion to consider arguments that particular school desegregation plans imposed an unfair or inequitable burden of transportation or other readjustments upon black students and their parents, but their pronouncements on the subject have been far from consistent. For example, in *Cisneros* v. *Corpus Christi Independent School District*, 467 F. 2d 142, 153 (5 Cir. 1972) the Court said:

> "In fashioning transportation plans the school board and District Court must avoid invidious discrimination

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6-1.1-19-4. Possible exceptions under the statute relating to court-ordered transfers cover only net transportation costs, I. C. 20-8.1-6.5-9, and additional operation costs in the first year of the program where the budget has previously been esablished, I. C. 20-8.1-6.5-4(b), and such exceptions are subject to the approval of the state tax board under I. C. 6-1.1-17.

> on the basis of race or national origin through the imposition of the burden of desegregation on one or both of the minority groups. Lee v. Macon County Board of Education [5th Cir. 1971], 448 F.2d at 753-754; Mims v. Duval County School Board, 5 Cir. 1971, 447 F.2d 1330, 1331-1332."[10]

Federal courts have, on the other hand, approved plans which involved transportation of substantially more black students than white, or greater travel distances, where justified by the facts of the particular situations.[11] The difference of views expressed by the courts on this subject has not gone unnoticed. See *Kelly* v. *Guinn*, 465 F. 2d 100, 111 (9 Cir. 1972). Most of these cases have been decided subsequent to this Court's decision in *McDaniel* v. *Barresi*, 402 U. S. 39 (1971), approving remedial steps which "will almost invariably require that students be assigned 'differently because of their race,'" 402 U. S. at 41, but which did not consider any issue of disproportionate burdens.

Petitioners do not here suggest a "constitutional absolute", 368 F. Supp. at 1228 (A107), requiring "exact mathematical

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10. See also *Kelley* v. *Metropolitan City Board of Education of Nashville, Tenn.*, 463 F. 2d 732, 751-752 (6 Cir. 1972) (concurring opinion of Judge McCree); *Brice* v. *Landis*, 314 F. Supp. 974, 977-979 (N. D. Calif. 1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 328 F. Supp. 1346, 1350-1352 (W. D. N. C. 1971) and subsequent opinion at 362 F. Supp. 1223, 1232-1234 (W. D. N. C. 1973); *Arvizu* v. *Waco Independent School District*, 495 F. 2d 499, 508 (5 Cir. 1974); *United States* v. *School District of Omaha*, 521 F. 2d 530, 546 (8 Cir. 1975) ("the burdens of integration shall be borne as equally as possible by blacks and whites in all geographic areas of the District.")

11. See *e.g.*, in addition to cases cited by the District Judge at 368 F. Supp. 1191, 1228 (A106), *Moss* v. *Stamford Board of Education*, 356 F. Supp. 675 (D. Conn. 1973); *Keyes* v. *School District No. 1, Denver, Colorado*, 521 F. 2d 465, 479 (10 Cir. 1975); *Thompson* v. *School Board of Newport News, Va.*, 465 F. 2d 83, 85 (4 Cir. 1972) and opinion after remand in 498 F. 2d 195, 197 (4 Cir. 1974); *Id.* at 199 (Butzner, J. dissenting); *Higgins* v. *Board of Education of City of Grand Rapids*, 508 F. 2d 779, 793-795 (6 Cir. 1974) (more latitude allowable in school district's voluntary desegregation plan).

equality" in the "burden" of desegregation, *Hart* v. *Community School Board, N. Y. School District No. 21*, 512 F. 2d 37, 53 (2 Cir. 1975). But none of the cases in which plans were approved over such objections involved, as does this case, a plan consisting solely of transfers of black students without any transfers of whites, nor did any of such cases involve the further complexities presented by an interdistrict remedy.

The District Court here justified its conclusion in part by citing pupil density data for selected schools based on pre-1971 enrollment figures and acreage, which in many instances have substantially changed, resulting in reduced density, and by inferring a conclusion that IPS physical plants are generally "antique" and inferior by comparison with those maintained by the suburban corporations. 368 F. Supp. at 1229-1230 (A107-108, 110). The probable inaccuracy of such assumption is illustrated by the facts that since 1960 IPS has spent over $115 million for construction of new schools and major additions or remodeling (excluding site acquisition costs),[12] all approved by state school authorities under the regulations cited by the Court, 368 F. Supp. at 1229 (A107), plus an additional $11 million for modernization of facilities (other than routine maintenance) not classified as "major" construction. These facts merely highlight the inadequacy of the District Court's factfinding procedure in entering its remedial decree, and the importance of a "perceptive and incisive assessment of the delicate factual circumstances involved," *Amos* v. *Board of Directors of City of Milwaukee*, 408 F. Supp. 765, 823 (E. D. Wis. 1976).[13]

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12. These projects include 61 elementary schools and all 11 high schools. Modernization projects include 34 additional elementary schools of which 22 had "major" construction or remodeling in the 1950's. The remaining 6 elementary schools still in use were constructed in the 1950's.

13. As a further example, the District Court assumed that "a 'one-way' suburban busing plan . . . would involve transportation of subsantially fewer pupils, and therefore be less expensive" as

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Moreover, the foregoing cases all involved plans which were implemented, or submitted to the Court for approval, upon the initiative of the local school board. More stringent requirements of equity and fairness in allocating the burdens and benefits of a desegregation plan may be applicable where a federal court decrees a plan of its own devising, without any input from the school districts involved, as in the case of the use of multi-member districts in state legislative apportionment plans. See *Chapman* v. *Meier*, 420 U. S. 1, 17-19 (1975).

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compared to a plan providing for exchange of students. 368 F. Supp. at 1229 (A108). This fails to take into account that portion of the judgment entered in this case which requires IPS to file a plan for "final desegregation of its schools" (A50), which judgment has become final although stayed. As the Court of Appeals said in the prior appeal, "obviously many steps have been taken to dismantle the IPS dual school system within its boundaries, but more steps must be taken." 503 F. 2d 68, 80. If the interdistrict and intradistrict parts of the plan are considered as a whole, and particularly if the reassigned black students are taken from those parts of IPS having greatest proximity to the suburban districts rather than solely from the central city schools identified in the Court's prior opinion as still segregated, 368 F. Supp. at 1228, 1232 (A113), the result may well be transportation of a substantially larger number of pupils.

Although a "two-way transfer plan involving some reassignment of suburban white students to IPS would alleviate some of the financial and other burdens placed on IPS by the present decree, petitioners do not advocate such a solution. While some of the problems identified by this Court in connection with a consolidation plan, *Milliken* v. *Bradley*, 418 U. S. at 743, would not exist, such a plan, as does the District Court's plan, "would make it much more difficult for individual parents to require accountability from teachers and administrators who are employed by districts other than that of their voting residence", *Evans* v. *Buchanan*, 416 F. Supp. at 348, and would have many other disadvantages. Petitioners would ask the District Court first to explore and determine the feasibility and constitutional sufficiency of all other possible options and techniques.

CONCLUSION.

Petitioners recognize that the questions which they here urge the Court to consider were not squarely presented or argued by IPS in the Court of Appeals.[14] However, issues concerning the nature and scope of the interdistrict remedy ordered and its disparate burden on black children, as well as the possible application of the Equal Educational Opportunities Act of 1974, were raised in the brief of the United States filed in that Court, although not discussed in the Court's opinion. Since this case originates in a federal court, there is no absolute requirement that the questions presented have been specifically argued and passed upon in the lower courts. Those courts were fully aware of the existence of these issues in the present case. In view of the unusual circumstances involving a change in the composition of an elected public body, the importance of the questions in the ongoing process of formulating desegregation decrees throughout the nation, the proliferation in recent years of such cases involving large urban school districts, and the substantial number of persons and the public interest, both locally and nationally, which would be affected by the outcome of this case, petitioners submit that the Court should grant certiorari to consider the questions presented.

Respectfully submitted,

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14. On May 4, 1976, after this case was briefed and argued in the Court of Appeals, new board members were elected, four of whom (constituting a majority of the board) took office July 1, 1976. The new board majority favors some kind of interdistrict remedy involving IPS and other Marion County systems but opposes the particular remedy decreed by the District Court, for the reasons suggested herein. Accordingly, the arguments for reversal which IPS presented to the Court of Appeals are not pursued in this Court.